Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-314

In the Matter of

Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes

REPORT AND ORDER

Adopted: May 10, 1990; **Released: July 2, 1990**

By the Commission: Commissioner Barrett concurring and issuing a statement.

1. This *Report and Order* is part of the Commission's continuing effort to eliminate abuse of its processes.[1] At issue in this proceeding is abuse of the Commission's processes through the improper use of petitions to deny and threats to file such petitions in the context of applications proceedings involving construction permits, modifications, transfers, assignments, and license renewals.[2] Also at issue is abuse in allotment proceedings. For the reasons discussed below, we are hereby adopting policies and rules to curb abuse of our license applications proceedings. Specifically, we are adopting rules limiting the amount of payment that may be made in exchange for withdrawing petitions to deny or threats to file petitions to deny in new licensing, modification, and transfer and assignment proceedings. We will also undertake case-by-case review of all citizens' agreements reached in consideration for withdrawing petitions to deny or threats to file petitions to deny in these proceedings to ensure that they comport with the public interest. In addition, we are clarifying our treatment of programming provisions contained in these agreements. We are also limiting the amount and type of consideration that may be paid for the withdrawal of an expression of interest in allotment proceedings to legitimate and prudent expenses incurred in preparing and filing the expression of interest. Finally, as an additional safeguard against abuse, we are clarifying our policies concerning expressions of interest in applying for and constructing a station made in allotment proceedings.

BACKGROUND

2. We expressed concern in our *Notice of Proposed Rule Making* [3] that our policy of permitting unlimited payments in exchange for dismissing a petition to deny or a counterproposal was fostering abuse of our processes. We were concerned that groups or individuals were filing petitions and counterproposals to exact monetary or other consideration rather than for the proper purpose of identifying deficiencies in applications or to operate a broadcast facility. We were also concerned that the threat of filing a petition to deny was being used to extract improper consideration from applicants.

3. We solicited comment on whether our concern regarding abuse of our processes was warranted and, if so, on a number of general proposals intended to curb this abuse. We proposed to eliminate abuse of petitions to deny by limiting the amount of consideration permitted in exchange for withdrawing, or refraining from filing, a petition to deny. Where citizens' agreements are negotiated in exchange for the withdrawal or non-filing of a petition to deny, the *Notice* also proposed case-by-case review of such agreements to ensure that they comport with the public interest. In addition, we proposed to clarify our policy on reviewing or enforcing programming commitments contained in the citizens' agreement. Finally, we sought comment on whether we should prohibit parties to an allotment rule making proceeding from entering into an agreement to withdraw a conflicting filing in exchange for payment in excess of legitimate and prudent expenses.[4] Our *Notice* was broad in scope, encompassing all application proceedings involving construction permits, licenses, modifications, renewals, and assignments and transfers, and expressions of interest in allotment rule making proceedings.

4. Subsequent to this *Notice*, the Commission adopted a notice in a separate proceeding related to the license renewal process, in which it removed abuse issues associated with license renewal from the instant proceeding.[5] In so doing, it stated that:

> [W]e will act on those MM Docket 87-314 issues which are unconnected with the renewal process at a later date. In addition, we expect that any actions we take to limit abuses in our renewal process which might serve as a model for limiting analogous abuses in other broadcast application contexts will be applied thereto in due course.[6]

5. In that proceeding, the Commission revised its rules and policies relating to comparative renewal proceedings by (1) limiting reimbursement for withdrawal of petitions to deny to the legitimate and prudent expenses of the petitioner; (2) reviewing citizens' agreements on a case-by-case basis to determine whether they serve the public interest; (3) presuming that any citizens' agreement under which the petitioner is paid to perform the promised reform is, absent clear and convincing evidence to the contrary, not consistent with the public interest; (4) declining to interpret and enforce private contractual agreements relating to programming; (5) eliminating the *Cameron* policy and thereby requiring competing applicants to provide reasonable assurance of site availability; and (6) prohibiting settlement payments for withdrawal of competing applications prior to the Initial Decision ("I.D.") but, subsequent to the I.D., allowing such payments provided they are limited to legitimate and prudent expenses of the competing applicant.[7]

6. In this *Report and Order*, we are focusing on the outstanding issues in MM Docket 87-314 not incorporated into our *Comparative Renewal* proceeding.[8] These are abusive use of petitions to deny in new licensing, modification, assignment and transfer proceedings and abusive use of filings in allotment proceedings.[9] We are also consider-

ing whether to clarify our treatment of programming provisions contained in citizens' agreements reached in exchange for settling petitions to deny in these contexts.

DISCUSSION

New Construction Permit, Modification, Transfer and Assignment Proceedings

7. After a careful review of the record in this proceeding, as well as our experience in administering petitions to deny filed in new construction permits, modification, and transfer and assignment proceedings, we find that the potential for abuse dictates that we impose rules to eliminate the use of petitions in these contexts, including those resulting in citizens' agreements, for purposes which do not serve the public interest. Accordingly, we will impose strict limitations on settlement payments that can be made in exchange for withdrawing petitions to deny filed in new licensing, modification, and transfer and assignment proceedings.[10]

8. The record in this proceeding clearly supports imposing limitations on settlements of petitions to deny. In our *Notice* we inquired whether our concerns over abusive use of petitions to deny were warranted. All parties who responded to our *Notice*,[11] except two[12], agreed that abuse of process in these proceedings is a serious problem. The National Black Media Coalition ("NBMC") and Wood, Lucksinger and Esptein ("WLE") charge that the Commission has insufficient evidence of abuse to support payment limitations. This assertion is contrary to the thrust of the record,[13] as well as NBMC's own comments. NBMC states that four of its affiliate groups were either expelled or withdrew from the organization because they had entered into agreements which were "coercive and extortionate."[14]

9. WLE and NBMC's assertion is also contrary to our experience in processing applications. In our *Comparative Renewal Report and Order* we recognized the potential for abuse of the petition to deny process in the context of comparative renewal proceedings. We found that the absence of limits on payments made in exchange for withdrawing petitions to deny allows the filing of disingenuous petitions designed solely to extract a windfall payment from the renewal applicant. As a result, we limited the payments which a renewal applicant could expend in consideration for withdrawal of a petition to deny to the legitimate and prudent expenses of the petitioner. We believe that the policy considerations that led us to limit settlement payments of petitions to deny in the renewal context, are equally applicable to petitions to deny filed in the new licensing, modification, and assignment and transfer context.

10. As with our license renewal process, we believe that similar incentives and mechanisms for abuse operate *vis-a-vis* our new licensing, modification, and transfer and assignment processes. Our current policy of imposing no limits on monetary settlements of petitions to deny reached in exchange for the dismissal of such petitions permits petitioners to extract payments in excess of the cost of prosecuting the petition to deny. Similarly, our policy of imposing no restrictions on citizens' agreements permits petitioners to reap benefits that are unrelated to the operation of the station in the public interest.

11. In addition, the prospect of delay created by the filing of a petition to deny in a new licensing, modification, transfer or assignment proceeding gives the applicant an incentive to settle even frivolous challenges rather than to engage in a time consuming and costly defense. The prospect of delay in the transfer and assignment process can be a particularly significant incentive to settle. One commenter alleges that when an applicant chooses not to pay off a challenger, the delay inherent in a contested assignment or transfer often results in lapsed contracts and stations going off the air to limit operating losses caused by the unusually long period of time before the transaction can be closed.[15] Due to the time sensitive nature of transfers; both parties to the transaction are likely to be concerned that the deal be consummated without delay. Thus, each would have an incentive to pay off a petitioner. Finally, the prospect of expending large sums of money to oppose petitions to deny provides applicants with the incentive to pay off challengers, even if the allegations bear no relationship to the public interest obligations of the applicant.[16]

12. The comments confirm that these incentives encourage the filing of abusive petitions to deny. The prospect of delay and the expenditure of valuable resources to defend against objections to an application has led parties to reach settlements for consideration unrelated to the original dispute.[17] It is simply more expedient for an applicant to pay off a petitioner, even a non *bona fide* petitioner, than to incur the costs and delay necessary to defend against a petition to deny.

13. The filing of abusive petitions to deny as a vehicle to extort large settlement payments or force licensees into citizens' agreements can harm the public interest in several ways. Petitions are specifically intended to enable interested parties to provide factual information to the Commission as to whether grant of an application would serve the public interest. To the extent that they are used for other than their intended purpose, *e.g.*, for private financial gain, to settle personal claims, or as an emotional outlet,[18] the public interest is disserved. Beyond the costs to licensees and the public, consideration of meritless challenges wastes Commission resources. Thus, the public interest is clearly served by adoption of rules that reduce the incentives and potential for abuse.

14. Contrary to WLE's and NBMC's allegations, the record in this proceeding is more than sufficient to support the Commission's actions to reduce abuse of its processes. It is not necessary for the Commission to compile an overwhelming record of tangible harm resulting from its current rules before it takes action to eliminate abuse.[19] Even in determining whether findings of fact are based upon substantial evidence (a standard that need not be met in rule making), allowance is given "for the reality that agency matters typically involve a kind of expertise --sometimes technical in a scientific sense, sometimes more a matter of specialization in kinds of regulatory programs."[20] The Supreme Court has stated that the Commission's rule making authority permits us to implement our view of the public interest standard "so long as it is based upon consideration of permissible factors and is otherwise reasonable."[21] As our discussion *supra* makes clear, the instant rule making is, in fact, based upon consideration of permissible factors and is reasonable. The record here confirms that coercive practices, contrary to the purpose and proper use of our process and to the public interest, are occurring. Given this record, modification of our rules to curb abuse is both necessary and justified. As we discuss in detail below, we will accom-

plish this by imposing strict limitations on settlement payments that can be made in exchange for withdrawal of application challenges.

15. *Limits on Monetary Settlements of Petitions.* Our treatment of settlements of petitions to deny depends on whether the petition is dismissed in exchange for monetary consideration or for a nonfinancial promise.[22] When a petition to deny is settled in exchange for money we are, as we did in the comparative renewal context, limiting such payments to the petitioner's legitimate and prudent expenses in prosecuting its application. We agree with commenters that we should attempt to curb abuse without discouraging the proper use of petitions to deny. Such petitions play an important role in our licensing process by bringing to our attention deficiencies in applicants, transferees and assignees, and thus help us to determine if the grant of an application will serve the public interest. We believe that imposing a legitimate and prudent expense limitation on settlements of petitions to deny will deter those seeking windfall profits without discouraging the filing of legitimate petitions. We believe that permitting recovery of a petitioner's reasonable expenses, and thereby insuring that a petitioner can be made economically whole, will facilitate and encourage continued public involvement in our application processes.[23]

16. *Threats to File Petitions to Deny.*[24] We are concerned that imposing monetary limits on settlements of petitions to deny will simply shift the potential for abuse to the pre-petition stage. Potential petitioners would be free to threaten to file a petition to deny and thereafter agree to refrain from filing the petition in exchange for payments in excess of petition-related expenses. In this way, would-be petitioners could easily undermine our out-of-pocket expense limitation imposed on filed petitions.

17. Therefore, we adopt a rule prohibiting any individual or group from making or receiving monetary payments in excess of legitimate and prudent expenses in exchange for withdrawing a threat to file, or refraining from filing, a petition to deny. Only payments that do not exceed out-of-pocket expenses directly related to the proposed petition will be permitted under this rule.

18. The Commission believes that extending the out-of-pocket expense limitation to settlements of threatened petitions will not discourage the continued use of petitions to informally resolve legitimate public interest concerns. Expressions of intent to file petitions to deny are not *per se* abusive; such expressions become abusive when linked with a demand for payment to remove the threat to file. Pre-filing discussions can serve the valuable public interest function of promoting dialogue between citizen's groups and licensees and informal resolution of disputes. Imposing limitations on the amount a licensee can pay in exchange for the non-filing of a petition should not impede informal resolution of disputes. Citizens' groups and others are still free to express their intent to file petitions and to agree not to file in exchange for expenses or for agreements to initiate nonfinancial reforms undertaken with unrelated third parties (*see* ¶¶ 19-22 below).

19. *Citizens' Agreements.* Citizens' agreements include agreements to withdraw either petitions to deny or expressions of intent to file such petitions in exchange for a nonfinancial promise. There are two principal issues regarding citizens' agreements before us. The first issue is whether any limitation should be placed on citizens' agreements reached in settlement of petitions to deny or threats to file petitions to deny against applications for new licenses, modifications, transfers, or assignments. Additionally, we consider whether restrictions should be placed on citizen's agreements in settlement of *threats* to file petitions to deny against license renewal applications. The second issue is whether we should clarify our treatment of future programming commitments contained in citizens' agreements.

20. Citizens' agreements can be used to circumvent our legitimate and prudent expense limitation on settlements of petitions to deny. They often require financial expenditures by the licensee to implement the reforms promised to the petitioner. In some cases, the agreements require that the licensee use the petitioner's own employment or programming resources to fulfill the agreement. These expenditures may directly or indirectly accrue to the financial benefit of the petitioner. Thus agreements to use programming or employment services provided by the petitioner, or a related person or entity, can merely disguise private payoffs for dismissing a petition to deny.

21. Thus, we will review on a case-by-case basis agreements reached in consideration for dismissing a petition to deny or a threat to file a petition to deny for the limited purpose of ensuring that the agreement comports with the public interest.[25] In reviewing such agreements, we will presume that any agreement with petitioner or would-be petitioner (hereinafter referred to collectively as "petitioner") pursuant to which a *third party unrelated to the petitioner* carries out a programming, employment, or other nonfinancial initiative is consistent with the public interest. Conversely, we will presume that any agreement with petitioner pursuant to which a *petitioner*, or any person or organization *related to the petitioner*, carries out for any fee,[26] including future payments, any programming, employment or other nonfinancial initiative, does not serve the public interest.[27] For example, we will regard an agreement to increase minority employment by using, for a fee, the services of petitioner or any person or organization related to petitioner, as presumptively contrary to the public interest. Our general presumption that a citizens' agreement in which the petitioner is paid to perform the promised reform is contrary to the public interest is rebuttable by clear and convincing evidence that the citizens' agreement does, in fact, comport with the public interest.[28]

22. Wood, Lucksinger and Epstein and the Media Access Project expressed concern that our rule would prohibit a broadcast applicant from agreeing to implement programming or minority employment initiatives. Their concern is unfounded. The prohibition is directed at payment or consideration for services rendered either by the petitioner or a person or entity related to the petitioner in exchange for withdrawing the petition to deny. Thus, an applicant's agreement with a petitioner to make changes in operations, programming, or employment either by itself or through a third party unrelated to the petitioner would likely meet with our approval. For example, our rule would *not* bar a provision in a citizens' agreement whereby an applicant agreed to increase the percentage of minority employees at the station through the use of an independent third party. However, we will regard any agreement which requires the applicant to use, for a fee, the services of the petitioner, or any person or organization related to the petitioner, to increase minority employment as presumptively contrary to the public interest.[29]

23. The second issue concerning citizens' agreements is whether the Commission should clarify its policy regarding interpreting and enforcing future programming commitments contained in these agreements.[30] Such agreements generally are private contractual matters between a licensee and a citizens' group. Subject to the nondelegable responsibilities imposed by the Act, licensees are free to enter voluntarily into any agreements or contracts they wish. In the past, the Commission has reviewed citizens' agreements when submitted as amendments to pending applications, when specifically requested to do so, or as part of a complaint for two purposes. First, the Commission determines whether such agreements "improperly delegate nondelegable licensee responsibilities, whether they improperly bind future exercise of the licensee's nondelegable discretion, and whether they otherwise comply with applicable statutes, rules, and policies."[31] Agreements reflecting improper or excessive delegations of control or authority have been rejected *ab initio* by the Commission.[32] We are making no change in this aspect of our policy.[33]

24. Second, the Commission has previously held that "[s]ubstantive agreement terms constituting proposals of future performance will assume the status of representations to the Commission, if made in an application submitted to [the Commission], and will be treated by the Commission as are all promises of future performance."[34] In doing so, however, the Commission has made clear that it would not enforce agreement terms not incorporated in a broadcast application or agreement terms in areas not cognizable by the Commission, even if incorporated in an application.[35]

25. We are hereby clarifying that, consistent with our treatment of citizens' agreements in the renewal context,[36] we will not enforce private contractual agreements related to programming in citizens' agreements reached in settlement of petitions filed in new licensing, modification and transfer and assignment contexts. As we stated in the *Comparative Renewal* proceeding, over the course of the last decade, we have eliminated detailed programming proposals from our processes, and we no longer apply a "promise versus performance" standard to applications.[37] Accordingly, unless an action taken by the Commission is specifically conditioned on licensee representations relating to programming matters, we do not intend to enforce private contractual agreements relating to programming.[38] Our decision not to enforce programming commitments made in citizens' agreements does not diminish our commitment to ensuring that broadcast licensees present programming responsive to the needs of the communities they serve. The renewal process remains the appropriate setting in which to assert that a licensee has failed adequately to serve those community needs.[39]

Allotment Proceedings

26. In our *Notice*, we expressed concern that FM and TV channel allotment proceedings may also be prone to abuse, and that limits on payments made in exchange for withdrawing counterproposals may be appropriate. We also questioned whether existing statutes and rules are sufficient to deter the filing of non-*bona fide* expressions of interest in applying for allotments, and sought comments on what if any additional measures should be taken to deter such filings. We conclude that there is significant potential for abuse of the allotment process. Therefore, we are limiting the amount and type of consideration that may be paid for the withdrawal of an expression of interest to legitimate and prudent expenses incurred in preparing and filing the expression of interest. As an additional safeguard against abuse, we are also clarifying our policies concerning expressions of interest in applying for and constructing a station made in allotment proceedings.

27. We believe that limiting the consideration that may be paid for withdrawal of an expression of interest will remove a significant incentive for the filing of non-*bona fide* expressions of interest. Furthermore, we believe this policy should apply to all expressions of interest, regardless of whether they are advanced in a pleading captioned as a counterproposal, or in a pleading otherwise denominated but having a similar potential for abuse. Our intent in this proceeding, clearly expressed from the outset, has been to deter abuse of our processes, and particularly, to prevent disingenuous filings which delay or obstruct legitimate proposals. An abusive party may ransom the withdrawal of its conflicting filing and thereby profit from abuse of our processes. The scope of our concern in this proceeding necessarily extends, therefore, to any conflicting filing with a potential functionally equivalent to that of a counterproposal to preclude or postpone favorable disposition of an initial allotment rule making petition. This would include, for example, proposals captioned as petitions for rule making which, given the prior filing of a proposal with which they conflict either directly or indirectly, must be effectively considered counterproposals. Similarly, it would include expressions of interest filed in proceedings involving upgrades of existing stations to higher class non-adjacent channels because such expressions can block the upgrade. Moreover, this approach simplifies administration of the limitation in that it does not require drawing fine distinctions between proposals based on the manner in which they are advanced.

28. Deterrence of non-*bona fide* proposals in allotment proceedings is especially important given the fact that delay in one allotment proceeding may affect pending proposals in numerous surrounding communities. Thus, delay in one contested proceeding often delays a number of related allotment proceedings. In addition, delay in allotment proceedings may delay resolution of related application proceedings.

29. As an additional safeguard against abuse, we are clarifying our treatment of representations of intent in allotment proceedings. Currently, parties are required to include an expression of interest in applying for, constructing, and operating the proposed facility if the allotment is made. While we have not previously stated a view on this issue, we are of the opinion that these expressions have the status of representations to the Commission, as do any assertions contained in pleadings filed with the Commission. Thus, a statement of interest in operating a station made by a party who, in fact, lacks the requisite intent to construct and operate the proposed facility will henceforth be considered a material misrepresentation within the meaning of Section 73.1015[40] of the Rules and would be subject to prosecution pursuant to Section 502 of the Act, forfeiture pursuant to section 503 of the Act or other appropriate administrative sanctions.[41]

30. However, we also wish to insure that a charge of misrepresentation is raised and treated as a serious matter. The mere fact that a party in one proceeding files a pleading in which it states an interest in applying for a station, but subsequently fails to do so, is not sufficient

evidence, by itself, of misrepresentation. On the other hand, where there is either direct evidence of misrepresentation, or evidence of a pattern of filings in which a party expresses an interest in an allotment and either voluntarily dismisses its proposal prior to action in the allotment proceeding or fails to file an application, a question may arise as to whether the party is advancing proposals in good faith. Depending on the facts in the case, the Commission may find the intent to deceive necessary for a determination of misrepresentation.

31. In sum, we believe that imposing settlement limitations and sanctioning parties who file without the intent to construct and operate the proposed facility will deter the filing of disingenuous proposals and aid the expeditious resolution of allotment and related cases.

32. *Enforcement.* In order to enforce our policies regarding petitions to deny, threats to file petitions to deny and citizens' agreements, we are adopting the following disclosure and certification requirements. Where a petitioner to deny seeks to dismiss a petition filed against an application for a new station or the transfer, assignment or modification of an existing facility, each party to the petition (the petitioner and the party or parties against whom petitions were filed) must submit a copy of any written agreement relating to the dismissal and an affidavit:

> (1) certifying that it has not received or paid and it will not receive or pay any money in exchange for the dismissal of the petition to deny in excess of legitimate and prudent expenses incurred by the petitioner seeking dismissal;
>
> (2) disclosing the exact nature and amount of any money or other consideration[42] paid or promised in connection with the dismissal of the petition to deny; and
>
> (3) disclosing the terms of any oral agreement related to the dismissal of the petition to deny.

Any petitioner seeking reimbursement of expenses under the agreement must also submit an itemized accounting of its expenses incurred in preparing, filing, and prosecuting its petition for which reimbursement is sought. This information is needed to verify the expenses for which the petitioner is seeking reimbursement. We are also adopting similar procedures for withdrawal of expressions of interest in FM and TV allotment proceedings. Where a petitioner to deny seeks to dismiss a petition filed against an application in exchange for a citizens' agreement all parties to any such agreement must, in addition, jointly submit a copy of the agreement to the Commission for approval.

33. Where a licensee or applicant has made any payments or has entered into a citizens' agreement with any person or organization in exchange for refraining from filing a petition to deny, the licensee or applicant must submit a copy of any written agreement and an affidavit containing the certifications and disclosures listed in ¶ 32, above.

34. To codify these requirements we are hereby amending our rules as outlined in the Appendix. We intend to enforce our policies and rules using the full panoply of penalties available against all persons who fail to comply. Accordingly, any licensee who fails to provide the accurate documentation, information or certification required by our amended rules will also violate Sections 73.1015 (as amended) and 73.3513(d) of our rules, will be subject, as appropriate, to revocation of their license under Section 312, to fines under Section 502, to forfeiture under Section 503(b) of the Communications Act, and to prosecution for misrepresentation of a material fact under 18 U.S.C. Section 1001. Likewise, any cross-filer in an allotment proceeding will be subject to similar penalties under similar circumstances. Any petitioner, or individual or entity who threatens to file a petition, who violates our new or amended rules will be subject to forfeiture, given proper notice, under Section 503(b)(5).

35. *Effective Date.* The policies and rules adopted here will become effective upon approval by the Office of Management and Budget ("OMB") pursuant to the Paperwork Reduction Act of 1980. For the same reasons articulated in our *Comparative Renewal Report and Order*,[43] the new policies and rules will apply to all petitions to deny pending[44] before the Commission as of the effective date. Pending petitions to deny that are settled and formally withdrawn prior to the effective date of the rules adopted herein likewise will be governed by the current policies and rules. Accordingly, such settlements, including settlements in the form of citizens' agreements, need not be presented to the Commission for approval. Likewise, expressions of interest in allotment proceedings that are formally withdrawn in a pleading filed before the effective date of the rules adopted herein will be governed by current policies and rules.

CONCLUSION

36. The policy revisions and rules set out in this *Report and Order* significantly advance our goal of reducing the opportunities, incentives, and mechanisms for abuse of our application processes. By placing limitations on payments that can be made in exchange for withdrawing petitions to deny filed against applications for new construction permits, modifications, transfers and assignments or in exchange for withdrawing expressions of interest in allotment proceedings, we are extending the limits imposed on petitions in the renewal context to filings in these other contexts. By prohibiting abusive threats to file petitions to deny (those in which money or other improper consideration is demanded in exchange for withdrawing the threat), we are ensuring that abusive practices are not merely shifted to the pre-petition stage. By reviewing citizens' agreements reached in exchange for the withdrawal of a petition or threat to file a petition on a case-by-case basis, we will ensure that these agreements further the public interest.

PROCEDURAL MATTERS

Pursuant to the Regulatory Flexibility Act of 1980, the Commission's Final Regulatory Flexibility Analysis is as follows:

I. Need and Purpose of this Action:

The goal of this action is to eliminate the opportunities, incentives and mechanisms for filing non *bona fide* petitions to deny in our new licensing, modification, and transfer and assignment application processes.

II. Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis:

No comments were received which related to the Initial Regulatory Flexibility Analysis.

III. Significant Alternatives Considered and Rejected:

We are taking several actions to curb abuse of our new licensing, modification, assignment, and transfer processes. The record demonstrates that there is the clear potential for abuse of these processes, and that reducing the potential for abuse furthers the public interest.

We are limiting, to legitimate and prudent expenses, the payments that can be made in exchange for withdrawing petitions to deny or threats to file petitions to deny against applications for new construction permits, modifications, transfers and assignments.[45] We believe that restricting payments to legitimate and prudent expenses will eliminate the primary incentive for filing or threatening to file abusive petitions without impeding their use to further the public interest as contemplated by the Communications Act. In so doing, we reject the option of banning all payments because banning the recovery of expenses may discourage the filing of legitimate petitions to deny, and thereby undermine the important monitoring role such petitions play in our regulatory scheme. We also reject the option of imposing no limits on payments made in exchange for withdrawing petitions or threats because that option does not address the serious problem of abuse of our process. Finally, we adopt similar limitations to govern the withdrawal of expressions of interest in FM and TV allotment proceedings. We reject the option of banning all payments for withdrawing an expression of interest because such a limit would unduly discourage settlements. In addition, the potential for abuse presented by allowing reimbursement of legitimate and prudent expenses can be separately addressed through enforcement and clarification of misrepresentation rules. We reject the option of imposing no limits because it does not address a significant incentive and potential for abuse.

37. The Secretary shall send a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981)).

PAPERWORK REDUCTION ACT STATEMENT

38. The decision contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new or modified information collection requirements on the public. Implementation of any new or modified requirements will be subject to approval by the Office of Management and Budget as prescribed by the Act.

ORDERING CLAUSES

39. Authority for the rule changes adopted herein is contained in Section 4(i) and (j), and 301, 303, 308 and 309 of the Communications Act of 1934, as amended.

40. Accordingly, IT IS ORDERED that the policies and the amendments to the Commission's Rules and Regulations adopted here and set forth in the Appendix below shall become effective on **October 4, 1990.**

41. IT IS FURTHER ORDERED that the Petition of the National Black Media Coalition to accept its late-filed comments IS GRANTED.

42. IT IS FURTHER ORDERED that this proceeding is TERMINATED.

43. For further information on this proceeding, contact Eugenia R. Hull, Mass Media Bureau, (202) 632-7792.

Federal Communications Commission

Donna R. Searcy
Secretary

APPENDIX

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154 and 303.

2. Section 73.1015 is amended by revising the introductory text to read as follows:

> The Commission or its representatives may, in writing, require from any applicant, permittee, or licensee written statements of fact relevant to a determination whether an application should be granted or denied, or to a determination whether a license should be revoked, or to any other matter within the jurisdiction of the Commission, or, in the case of a proceeding to amend the FM or Television Table of Allotments, require from any person filing an expression of interest, written statements of fact relevant to that allotment proceeding. No applicant, permittee, licensee, or person who files an expression of interest shall in any response to Commission correspondence or inquiry or in any application, pleading, report or any other written statement submitted to the Commission, make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission.

* * * * *

3. Section 73.3524 is redesignated as Section 73.3588 and the title and paragraphs (a) and (b) introductory text are revised to read as follows:

§ 73.3588. Dismissal of petitions to deny or withdrawal of informal objections.

> (a) Whenever a petition to deny or an informal objection has been filed against any application, and the filing party seeks to dismiss or withdraw the petition to deny or the informal objection, either

unilaterally or in exchange for financial consideration, that party must file with the Commission a request for approval of the dismissal or withdrawal, a copy of any written agreement related to the dismissal or withdrawal, and an affidavit setting forth:

* * * * *

(b) Citizens' agreements. For purposes of this section, citizens agreements include agreements arising whenever a petition to deny or informal objection has been filed against any application and the filing party seeks to dismiss or withdraw the petition or objection in exchange for nonfinancial consideration (*e.g.*, programming, ascertainment or employment initiatives). The parties to such an agreement must file with the Commission a joint request for approval of the agreement, a copy of any written agreement, and an affidavit executed by each party setting forth:

* * * * *

4. A new Section 73.3589 is added to read as follows:

Section 73.3589. Threats to file petitions to deny or informal objections.

(a) No person shall make or receive any payments in exchange for withdrawing a threat to file or refraining from filing a petition to deny or an informal objection. For the purposes of this Section, reimbursement by an applicant of the legitimate and prudent expenses of a potential petitioner or objector incurred reasonably and directly in preparing to file a petition to deny will not be considered to be payment for refraining from filing a petition to deny or informal objection. Payments made directly to a potential petitioner or objector, or a person related to a potential petitioner or objector, to implement nonfinancial promises are prohibited unless specifically approved by the Commission.

(b) Whenever any payment is made in exchange for withdrawing a threat to file or refraining from filing a petition to deny or informal objection, the licensee must file with the Commission a copy of any written agreement related to the dismissal or withdrawal, and an affidavit setting forth:

(1) Certification that neither the would-be petitioner, nor any person or organization related to the would-be petitioner, has received or will receive any money or other consideration in connection with the citizens' agreement other than legitimate and prudent expenses reasonably incurred in preparing to file the petition to deny;

(2) Certification that unless such arrangement has been specifically approved by the Commission, neither the would-be petitioner, nor any person or organization related to the would-be petitioner, is or will be involved in carrying out, for a fee, any programming ascertainment, employment or other nonfinancial initiative referred to in the citizens' agreement; and

(3) The terms of any oral agreement.

(c) For purposes of this section:

(1) Affidavits filed pursuant to this section shall be executed by the licensee, if an individual; a partner having personal knowledge of the facts, if a partnership; or an officer having personal knowledge of the facts, if a corporation or association.

(2) "Legitimate and prudent expenses", are those expenses reasonably incurred by a would-be petitioner in preparing to file its petition for which reimbursement is being sought.

(3) "Other consideration" consists of financial concessions, including but not limited to the transfer of assets or the provision of tangible pecuniary benefit, as well as non-financial concessions that confer any type of benefit on the recipient.

5. Section 73.3584 is amended by revising the heading to read as follows:

Section 73.3584 Procedure for filing petitions to deny.

Part 1 of Title 47 of the Code of Federal Regulations is amended as follows:

6. The authority citation for Part 1 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

7. Section 1.420 is amended by adding a new paragraph (j) to read as follows:

* * * * *

(j) Whenever an expression of interest in applying for, constructing, and operating a station has been filed in a proceeding to amend the FM or TV Table of Allotments, and the filing party seeks to dismiss or withdraw the expression of interest, either unilaterally or in exchange for financial consideration, that party must file with the Commission a request for approval of the dismissal or withdrawal, a copy of any written agreement related to the dismissal or withdrawal, and an affidavit setting forth:

(1) A certification that neither the party withdrawing its interest nor its principals has received or will receive any money or other consideration in excess of legitimate and prudent expenses in exchange for the dismissal or withdrawal of the expression of interest;

(2) The exact nature and amount of any consideration received or promised;

(3) An itemized accounting of the expenses for which it seeks reimbursement; and

(4) The terms of any oral agreement related to the dismissal or withdrawal of the expression of interest. In addition, within 5 days of a party's request for approval, each remaining party to any written or oral agreement must submit an affidavit setting forth:

(5) A certification that neither it nor its principals has paid or will pay money or other consideration in excess of the legitimate and prudent expenses of the party withdrawing its expression of interest in exchange for dismissal or withdrawal of the expression of interest; and

(6) The terms of any oral agreement relating to the dismissal or withdrawal of the expression of interest.

FOOTNOTES

[1] *See Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301),* Report and Order in Gen. Docket No. 88-328, 4 FCC Rcd 3853 (1989); *Formulation of Policies and Rules Relating to Broadcast Renewal Applicants,* First Report and Order in BC Docket No. 81-742, 4 FCC Rcd 4780 (1989)(" *Comparative Renewal Report and Order* "), *petition for reconsideration denied, Memorandum Opinion and Order,* FCC 90-190 (adopted May 10, 1990); *Notice of Proposal Rule Making* in MM Docket No. 90-263, FCC 90-193 (adopted May 10, 1990) ("Comparative New Abuse Notice").

[2] We address license renewal matters only in a limited respect. *See* n. 8, *infra.*

[3] *Amendment of Sections 1. 420 and 73. 3584 of the Commission's Rules Concerning Abuses of the Commission's Processes,* 2 FCC Rcd 5563 (1987) (" *Notice* ").

[4] As a collateral issue, the Commission also sought comment on the effectiveness of the misrepresentation rule and/or the fine/forfeiture provisions of the Act, 47 U.S.C. §§ 502, 503, as deterrents against abusive filings.

[5] *Second Further Notice of Inquiry and Notice of Proposed Rule Making in BC Docket No. 81 - 742,* 3 FCC Rcd 5179 (1988).

[6] *Id.* at 5180 n.15.

[7] *See Comparative Renewal Report and Order,* 4 FCC Rcd 4780.

[8] One issue raised in MM Docket 87-314, which is related to license renewal but was not addressed in our *Comparative Renewal Report and Order,* is whether limitations should be placed on threats to file petitions to deny against renewal applications. Although we could address this issue in our reconsideration *Order* in the *Comparative Renewal* proceeding, which we adopted concurrently with this *Report and Order,* it is more appropriate to address the issue here in our discussion of threats to file petitions to deny in other contexts. *See* ¶¶ 16-21 *infra.*

[9] Our *Notice* did not expressly encompass payments in exchange for withdrawal of competing applications in the context of comparative new proceedings. Accordingly, concurrent with this *Report* we adopted a *Notice of Proposed Rule Making* in MM Docket 90-263 to propose abuse-related reforms in this context. *See* note 1 *supra.* Competing applications do not arise in the context of assignments and transfers. Section 310(d) of the Communications Act limits the Commission's consideration to the proposed transferee/assignee only. 47 U.S.C. § 310(d).

[10] In the context of abuse of process, we have considered petitions to deny to include informal objections and other filings which have a like potential for abuse, and we will continue to do so. Accordingly, the rules we are adopting in this *Report and Order* relate to both petitions to deny and to informal objections. *See* Appendix.

[11] Initial Comments were filed by Robert A. Jones, a professional engineer with broadcast clients ("Jones"); Media Access Project ("MAP"); National Association of Broadcasters ("NAB"); Pepper and Corazzini, a Washington communications law firm ("P&C"); and Wood, Lucksinger and Epstein, a Washington law firm with clients involved in negotiations with broadcast licensees over pending applications ("WLE"). Joint comments were filed by KLOK Radio, Ltd., the licensee of stations KLOK(AM), San Jose, California and KFIG-AM/FM, Fresno, California, and KWIZ, Ltd., the licensee of stations KWIZ-AM/FM, Santa Ana, California ("KLOK/KWIZ"). The National Black Media Coalition ("NBMC") received an extension of time to submit its initial comments, *See Order,* 3 FCC Rcd 561 (1988), yet filed its comments one day late accompanied by a request to accept the comments as though timely filed. In the interest of considering all possible issues and of ensuring the fullest possible participation in this proceeding, we will grant NBMC's request. Reply comments were filed by MAP and KLOK/KWIZ.

[12] *See* Comments of WLE and NMBC.

[13] Several commenters provided examples of alleged abuses. For example, P&C stated that its clients have been subject to an increasing number of petitions filed by parties intent on forcing the payment of unpaid, disputed debts or as an emotional outlet. These petitioners included an ex-employee seeking reinstatement, a minority shareholder seeking a sale of the station, and a law firm which had not been paid by the previous owner. *See* Comments of P&C at 2-3. Similarly, Jones stated that an ex-employee threatened to file a petition to deny his transfer application unless he paid the employee disputed consulting fees. *See* Comments of Jones at 1.

[14] *See* Comments of NBMC at 10, n.12. NBMC provides this information to support its assertion that self-regulation is sufficient to avoid abuses. In this regard, it notes that one of the expelled affiliates had entered into an agreement which passed Commission review. Although NBMC's self-regulation and efforts to uncover abuse are laudable, we believe that reducing the incentive for abuse is a more effective method of eliminating these types of abuse. It is evident from the commenters' allegations that we can not rely on self-regulation to halt abuse because not all parties are subject to oversight. Reducing the incentive for abuse will deter such parties. Additionally, NBMC indicates that rules limiting reimbursement may limit the ability of labor unions to convince applicants to enter into collective bargaining agreements as part of the petition settlement, or prevent program producers from settling a petition to deny where the settlement requires an applicant to purchase the producer's programs. *See* Comments of NBMC at 8, n.8. In our view, under the Communications Act, these are not proper uses of the petition to deny or citizens' agreement processes.

[15] *See* Comments of P&C at 3.

[16] *See* Comments of NAB at 4, KLOK/KWIZ at 4, and P&C at 2-4.

[17] *See, e.g.,* Comments of KLOK/KWIZ at 5, and MAP at 10.

[18] *See* Comments of NAB at 9, MAP at 7, P&C at 2, and Jones at 2.

[19] *Multiple Ownership Rules,* 45 FCC 1476, 1482, *recon. denied,* 45 FCC 1728 (1964), *citing FCC v. RCA,* 346 U.S. 86, 96-97 (1953).

[20] *Greater Boston Television Corp.* v. FCC, 444 F.2d 841 (D.C. Cir. 1970) *cert. denied,* 403 U.S. 923 (1971).

[21] FCC v. WNCN *Listeners Guild, et. al,* 450 U.S. 582, 594 (1987) *quoting FCC v National Citizens Commitee for Broadcasting,* 436 U.S. 775, 793 (1978).

[22] Restrictions on nonfinancial promises or citizens' agreements are discussed in ¶¶ 19-22 infra.

[23] For this reason, we reject Jones' suggestion to ban all settlement payments to petitioners. We also reject the two-step review of petitions to deny suggested by P&C. P&C proposes that (1) the staff review the petition to determine if the matters alleged, considered in a manner favorable to the petitioner, would warrant denial or designation of the application for hearing; and (2) if designation of an issue is called for, the petition would be processed routinely by the staff, otherwise it would be dismissed. See Comments of P&C at 4. Pursuant to Section 309 of the Act, the Commission already possesses, and has exercised, the authority to dismiss petitions for failing to make specific allegations of fact bearing on the applicant's public interest qualifications or performance. 47 U.S.C. § 309(d)(2). This has not eliminated abuse of our petition to deny process because disingenuous petitioners simply circumvent this requirement by creating petitions that ostensibly raise specific allegations of fact. Also, initial staff review can itself take significant time, even if a petition to deny is ultimately dismissed.

[24] The policy and rule changes related to threats to file petitions to deny (¶¶ 16-18), apply to threats against license renewal applications as well as to threats against the non-renewal applications that are generally the subjects of this *Report and Order*. *See n. 8 supra.*

[25] *See* ¶ 33 infra.

[26] Even if the fee only covers the expenses of the services provided, we would still be inclined to disapprove the agreement.

[27] In applying this presumption, we do not intend to chill the legitimate use of petitions to deny and citizens' agreements by persons or organizations who act as private attorneys general to help insure that licensees comply with the Commission's policies and rules, including its EEO policies and rules. Rather, we intend to apply this presumption in a reasonable and equitable manner.

[28] Even where we do approve a private settlement of a petition to deny it does not necessarily dispose of issues that have been raised. If a petition contains specific allegations of fact that raise a substantial and material question about the applicant's qualifications, the Commission must consider and resolve the issue regardless of any agreement reached among the parties. *See, e.g., Booth American Company,* 58 FCC 2d 553, 554 (1976); Agreements, 57 FCC 2d at 53.

[29] NBMC maintains that this will require applicants seeking to hire minorities as the result of a citizens' agreement with NBMC to use NAB's Job Bank which, NBMC maintains, is the only national resource available to broadcasters for minority broadcast employees other than NBMC's EEO Resource Center. We do not believe that this is a sufficient reason to alter our rule for two reasons. First, NBMC ignores regional and local employee location services and the possibility of other viable alternatives to NBMC's and NAB's placement services. Second, as discussed above, if NBMC demonstrates that an applicant's agreement to pay for use of NBMC's service is consistent with the public interest, our presumption is rebutted.

[30] *See Agreements Between Broadcast Licensees and the Public, 57 FCC 2d 42 (1975) ("Agreements").*

[31] *Id.* at 54.

[32] *See, e.g.,* Nancy Spears, 54 FCC 2d 1238 (1975).

[33] Moreover, the Notice specifically excluded from reconsideration our policies established in *Agreements* "concerning EEO or other non-programming aspects of station operation." 2 FCC Rcd 5563 at 5566 n.46. Further, Section 73.3526(a)(1) of the Commission's Rules, 47 C.F.R. § 73.3526(a)(1), provides that commercial broadcast stations must maintain in their public files copies of "every written citizen agreement." We are not changing this requirement.

[34] *See Agreements,* 57 FCC 2d at 54.

[35] *Id.* at 52, n.12.

[36] *See Comparative Renewal Report and Order,* 4 FCC Rcd at 4787.

[37] *See Report and Order in BC Docket No. 79-219 (Deregulation of Radio), supra* note 57; *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations,* 98 FCC 2d 1076 (1984), *recon. denied,* 104 FCC 2d 358 (1986), *aff'd in part and remanded in part sub nom. Action for Children's Television v. FCC,* 821 F.2d 741 (D.C. Cir. 1987) *(TV Deregulation).*

[38] Indeed, as circumstances change, such agreements may become dated and contrary to the broader public interest. For example, more pressing commmunity issues may arise which make it difficult for a broadcaster to address an issue that it previously agreed to address. Or, a broadcaster may decide, consistent with our radio and television deregulation proceedings, that another station in the market so completely dealt with a certain community need in its programming that it would not be a wise allocation of its limited resources to address the same community need.

[39] *See generally TV Deregulation,* 98 FCC 2d at 1077; *Deregulation of Radio,* 84 FCC 2d at 982-83, 991-92.

[40] 47 C.F.R. § 73.1015, currently provides, in pertinent part: "No applicant, permittee, or licensee shall in any response to Commission correspondence or inquiry or in any application, pleading, report or any other written statement submitted to the Commission, make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission." This rule will be amended to encompass misrepresentation by parties to allotment proceedings.

[41] 47 U.S.C. §§ 502 and 503. Section 1.52 of the Commission's rules sets forth rules concerning signature and verification requirements. These rules aid in ensuring accountability of those filing pleadings with the Commission. Therefore, we believe these rules should be strictly enforced in allocations proceedings.

[42] "Other consideration," as used here, constitutes any *non-financial* concessions, including but not limited to programming, ascertainment or employment concessions.

[43] 4 FCC Rcd at 4788, ¶ 62.

[44] All petitions to deny filed in application proceedings will be deemed pending before the Commission from the time a petition is filed with the Commission until an order of the Commission granting or denying the petition is no longer subject to reconsideration by the Commission or review by any court.

[45] This *Report and Order* also addresses threats in the license renewal context. *See n. 8 supra.*

CONCURRING STATEMENT OF COMMISSIONER ANDREW C. BARRETT

Re: Amendment of Sections 1.420 and 73.3584 of the Commissions Rules Concerning Abuses of the Commission's Processes. (MM Docket No. 87-314)

As with our Memorandum Opinion and Order in BC Docket No. 81-742, issued at the Commission's May agenda meeting, I have weighed carefully my decision on this Report and Order (Order). My primary focus in reviewing this Order was to ensure that we eliminate potential abuses in new licensing, modification, and transfer and assignment proceedings without "chilling" the legitimate use of petitions to deny and citizens' agreements. I support this action because, after reviewing the various factors herein, I believe that the Order balances sufficiently the need to deter potential abuses of our processes with the need to encourage petitions to deny for legitimate public interest purposes. I also support this action for several other reasons. First, the thrust of the record in this docket indicates that there have been problems of abuse in the past.[1] Second, in addition to that record, the Commission's experience in processing applications is another legitimate basis for deciding whether the potential for abuse justifies a modification to our rules.[2] Third, by allowing legitimate and prudent settlement expenses, the Order acknowledges the important role of legitimate petitions to deny in our application processes. [3] Finally, the Commission acknowledges that its case-by-case review of citizens' agreements is not intended to "chill" the legitimate use of this mechanism by individuals or organizations.[4]

I do not believe that our action in this docket is intended to undermine the legitimate "private attorneys general" efforts of individuals or organizations. I write separately to clarify that intent. Further, as the Commission receives settlement agreements or citizens' agreements for review and approval, I intend to apply these rules in a reasonable and equitable manner.

FOOTNOTES FOR STATEMENT

[1] *See Order* at 4-5 § 8.

[2] *See Order* at 7 § 14.

[3] *See Order* at 8 § 15.

[4] *See Order* at 10 § 21 n. 27.